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Supreme Court, U.S.
FILED
97 1012 DEC 18 1997
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No.

IN THE

Supreme Court of the United States

October Term, 1997

ROBERT J. COUPÉ,

Petitioner

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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53 pp

QUESTION PRESENTED

The "Age 60 Rule," 14 C.F.R. §121.383(c), promulgated by the Federal Aviation Administration before the passage of the Age Discrimination in Employment Act, (ADEA), prohibits all pilots in scheduled passenger and cargo operations from working after they reach age 60. The ADEA prohibits age-based discharge by an employer unless the employer can prove that age is a bona fide occupational qualification (BFOQ) that is reasonably necessary to the employer's "particular business." 29 U.S.C. § 623(f). The Equal Employment Opportunity Commission (EEOC), which enforces the ADEA, has repeatedly asserted that the Age 60 Rule is not a BFOQ. The question presented is:

Whether the FAA has the power, in its capacity as regulator of air commerce, to require age-based discharge and to establish a bona fide occupational qualification under the Age Discrimination in Employment Act for all pilots subject to the Age 60 Rule, contrary to the regulations and the interpretation of the EEOC, the agency that administers the ADEA?

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IN THE

Supreme Court of the United States

October Term, 1997

ROBERT J. COUPÉ,

Petitioner

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

Robert J. Coupé respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra.*, a-1 - a-10) is reported at 121 F.3d 1022. The opinion of the district court (App. B, *infra.*, a-11 - a-18) is unreported.

JURISDICTION

The court of appeals entered its judgment on August 4, 1997. An application for an extension of time within which to file a petition for a writ of certiorari was presented to Justice Stevens who, on October 20, 1997, extended the time for filing the writ to and including December 18, 1997. (Application No. A-286.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the interpretation and interrelationship of the Age Discrimination in Employment Act, 29 U.S.C. § 623, the "Age 60 Rule," promulgated by the Federal Aviation Administration, 14 C.F.R. § 121.383(c), and regulations of the Equal Employment Opportunity Commission that prescribe the requirements for bona fide occupational qualifications, 29 C.F.R. § 1625.6. These statutes and regulations are set forth in the appendix. (App. C at a-19 - a-21.)

STATEMENT OF THE CASE

Under the "Age 60 Rule," promulgated in 1959, before the passage of the Age Discrimination in Employment Act (ADEA), the Federal Aviation Administration (FAA) prohibits pilots from operating commercial aircraft subject to Part 121 of the Federal Aviation Regulations after they reach their 60th birthday. 14 C.F.R. § 121.383(c). The rule applies to air cargo operations as well as to most scheduled passenger operations.[1]

Although justified as a safety measure, the rule's promulgation was promoted by airlines that had been stymied in

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[1]Part 121 of the Federal Aviation Regulations, 14 C.F.R. Part 121, regulates scheduled passenger flights in aircraft of ten seats or more and any "all-cargo" operations. 14 C.F.R. § 121.1. *See also* 14 C.F.R. § 119.3 (defining "supplemental operation" to include all-cargo operations.) The rule does not apply to commuter aircraft of less than nine seats, which operate under 14 C.F.R. Part 135, or to non-scheduled passenger carriage, including corporate aircraft and aircraft under private charter. These may be operated by pilots of any age irrespective of the number of passengers that are carried.

efforts to negotiate a mandatory retirement age with the pilots' unions. *See*, Karl Ruppenthal, *Compulsory Retirement of Air Line Pilots*, 14 Indus. & Labor Rel'ns Rev. 528 (1961). As the Seventh Circuit Court of Appeals observed, "Since its enactment, the age sixty rule has been the subject of continuous controversy and intermittent reconsideration by the FAA." *Aman v. FAA*, 856 F.2d 946, 948 (7th Cir. 1988) (detailing a history of studies and rulemaking proceedings involving the rule).

In 1990, in response to criticism of the rule expressed in the *Aman* case and in hearings before the House Select Committee on Aging[2], the FAA commissioned a study "to consolidate accident data and correlate it with flying experience and age of pilots." *See* 60 Fed. Reg. 65,978 (1995). The ensuing "Hilton Report" concluded that there was "no hint of an increase in accident rate for pilots of scheduled air carriers as they neared their 60th birthday." *Id., quoting Age 60 Project*, Hilton Systems Technical Report 8025-3C(R2) at 6-2. In light of this conclusion, the FAA instituted docket proceedings to reexamine the Age 60 Rule. 58 Fed. Reg. 21,336 (1993). These proceedings were later combined with rulemaking proceedings that proposed to extend the scope of Part 121 of the Federal Aviation Regulations to regulate commuter operations in aircraft with more than ten seats. 60 Fed. Reg. 16,237 (1995).

On December 15, 1995, following the commencement of suit in the court below, the FAA issued final rules for commuter air operations, 60 Fed. Reg. 65,832 (1995), and a

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[2]*See Age Discrimination Against Airline Pilots: Hearing before the House Select Comm. on Aging*, 96th Cong. (1979); *Age Discrimination and the FAA Age 60 Rule: Hearing before the House Select Comm. On Aging*, 99th Cong. (1985).

"Disposition of comments and notice of agency decisions" concerning the Age 60 Rule, *id.* at 65,977. After discussing the scientific evidence and arguments for relaxation or repeal of the rule, the FAA determined that "although there is no one obviously 'right answer' discovered through scientific or medical studies," *id.* at 65,985, "concerns regarding aging pilots and underlying the original rule have not been shown to be invalid or misplaced," *id.* at 65,980. The rule was left unchanged and was extended to commuter operations to which it had not previously applied. An administrative appeal of the FAA's determination was sustained by a sharply divided panel of the D.C. Circuit. *Professional Pilots Fed'n v. FAA*, 118 F.3d 758 (D.C. Cir. 1997), *reh'g denied*, Nov. 5, 1997.

Petitioner was a pilot employed as a captain in air cargo operations by Federal Express Corporation. Six months before his 60th birthday he gave notice to his employer that he wanted to continue working as a captain after he turned 60. The company refused on the grounds that the Age 60 Rule prohibited his continued employment in that position. He was instead offered employment as a flight engineer at lower pay. (App. A at a-3.)

Petitioner filed an age discrimination charge with the Equal Employment Opportunity Commission under the ADEA. The EEOC dismissed the charge with a special notation that the employer's actions were "taken pursuant to Federal Air Regulations." A box stating that the facts "fail to state a claim under any of the statutes enforced by the Commission" was left blank. (R-41.)[3]

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[3]Refers to the record in the joint appendix on appeal before the court below.

Petitioner then filed suit against Federal Express seeking a declaration that the Age 60 Rule was in violation of the ADEA and an injunction restoring the pilot to his former position. The complaint did not ask for monetary damages. The employer moved to dismiss under Fed. R. Civ. P. 12(b)(6), arguing that the Age 60 Rule was "a lawful exercise of rulemaking authority," (R-11), and therefore constituted an exception to the ADEA as "a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f). The district court granted the dismissal without hearing argument on the motion or providing petitioner an opportunity to present evidence as to whether the rule was reasonable as it applied to pilots who did not carry passengers. The district court reasoned that

> [I]f the FAA requires a rule in the interest of public safety, regardless of its continued viability, the rule's implementation is "reasonably necessary" to the perpetuation of a logical business objective.

(App. B at a-18.)

Petitioner appealed to the Sixth Circuit on two grounds. First, he argued that the conclusion that the Age 60 Rule was per se a BFOQ violated the EEOC requirement, approved by this Court in *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 411 (1985), that the existence of a BFOQ "should be resolved on a 'case-by-case' basis." (Br. for Appellant at 13-21.) Second, the Petitioner urged that the fact that Federal Express was required to comply with the Age 60 Rule by the FAA did not relieve the employer from its obligation under the ADEA to avoid age discrimination because the FAA could not legally exempt private parties from complying with a statute over which it had no regulatory authority. (Br. for Appellant at 21-25.)

The Sixth Circuit rejected these arguments and affirmed the district court. It concluded that it could not declare the Age 60 Rule an invalid exercise of agency rulemaking power because "the FAA not being a party to this litigation, we are at a loss to understand how we could do so." (App. A at a-8.) Then, after acknowledging that "the FAA has never expressly purported to establish a bona fide occupational qualification for ADEA purposes," (App. A at a-5), the court below determined that the Age 60 Rule constitutes a BFOQ as a matter of law because "the rule has been adopted on grounds that could support a BFOQ defense had the age limit been adopted by the employer voluntarily." (App. A at a-8).

The court's analysis was not based on evidence that had been submitted by the parties or considered by the district court. Instead, the Sixth Circuit relied on the FAA's December, 1995 explanation of its decision to maintain the Age 60 Rule and extend it to new types of aircraft operations. 60 Fed. Reg. 65,977 (1995). The court analyzed the FAA's disposition in light of EEOC regulations that prescribe the standards that an employer must satisfy to establish that age is a BFOQ. First, the court found that the FAA had determined that "safety concerns made the age 60 rule 'reasonably necessary' for pilots in Part 121 operations," satisfying the EEOC requirement that "the age limit is reasonably necessary to the essence of the business." 29 C.F.R. § 1625.6(b)(1); *see also* 29 U.S.C. § 623(f)(1) (identical ADEA requirement). (App. A at a-6.) Second, the court held that

> The FAA's age 60 rule is premised on the impossibility or impracticality of determining, on

> an individualized basis, whether a particular pilot's age renders him unable to perform safely and effectively.

(App. A at a-7 .) This finding, in the court's view, satisfied the EEOC requirement that an employer prove that "some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age." 29 C.F.R. § 1625.6(b)(3).

In support of the second finding the court below quoted excerpts from the FAA's disposition and concluded that "The FAA rejected the notion that current medical technology can distinguish between those pilots over 59 years old who present safety risks and those who do not." (App. A at a-7). Although EEOC regulations required that an employer who offers a safety justification for age-based discharge prove that there is "no acceptable alternative which would better advance it or equally advance it with less discriminatory impact," 29 C.F.R. § 1625.6(c), the court found that this requirement had been satisfied even though no evidence had been presented to the district court. The court reasoned that "The FAA has considered alternatives to the age 60 rule, such as performance testing and medical certification, and has rejected each alternative as less safe than the age 60 rule." (App. A at a-7)[4].

Having concluded that the FAA's explanation for the Age 60 Rule conformed to the EEOC requirements for proof of

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[4]All captains operating under Part 121 are required to have a first-class medical certificate, which involves a comprehensive medical examination every six months. 14 C.F.R. § 67.13. In addition, the Federal Aviation Regulations prescribe frequent training and proficiency checks for pilots in Part 121 operations. *See, e.g.*, 14 C.F.R. §§ 121.433, 121.440, 121.441.

a BFOQ, the Sixth Circuit then addressed the issue of whether the rule could operate as a BFOQ for all Part 121 employers, irrespective of the specific nature of their operations. The court acknowledged that "The BFOQ defense requires a particularized, factual showing that the employer's practice is reasonably necessary for the particular job in question." (App. A at a-8, citations omitted.) But it declined to require a particularized showing in the case of Federal Express because it would require the employer "to second-guess the very agency established by Congress to regulate it." (App. A at a-9).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH THE PLAIN LANGUAGE OF THE ADEA, EEOC REGULATIONS THAT EXECUTE THE ADEA, AND THIS COURT'S DECISIONS INTERPRETING THE ADEA.

The Age Discrimination in Employment Act requires that any bona fide occupational qualification be necessary to the normal operation of a "particular business." 29 U.S.C. § 623(f)(1). The EEOC prescribes that any BFOQ be established "on the basis of all the pertinent facts surrounding each particular situation." 29 C.F.R. § 1625.6(c). In *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412 (1985) this Court explained that the language meant that "Congress expressly decided that problems involving age discrimination in employment should be resolved on a 'case-by-case basis' by proof to a jury." The court below, in holding that the Age 60 Rule establishes a BFOQ as a matter of law, ignored both the plain language of the statute and the regulation and the unequivocal direction of this Court.

The starting point for analysis is the language of the statute itself. *See Ohio Empl. Ret. System v. Betts*, 492 U.S. 158 (1989) (holding that the plain language of the ADEA controlled over contrary EEOC regulations and legislative history). The ADEA makes it unlawful for an employer "to discharge...or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age." 29 U.S.C. § 623(a). The exception for a bona fide occupational qualification is limited to circumstances in which the BFOQ is "reasonably necessary to the normal operation of the particular business or where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f). This exception is to be construed in light of the purpose expressed in the preamble to the ADEA "to promote employment of older persons based on their ability rather than age." 29 U.S.C. § 621(b). In this case, in which the pilot was discharged solely because of his age, the statute requires that the age barrier be confined to the operation of the employer's "particular business." The decision of the court below, which held that the employer's burden of proof is satisfied by demonstrating the existence of an age-based federal agency rule by which the employer is bound, (App. A at a-8), radically departs from the standard required by the statute as well as from the statute's purpose.

The plain language of the statute has been buttressed by regulations of ADEA's administering agency, the EEOC. These regulations not only demonstrate that the BFOQ exception is linked to specific employment situations; they also confirm that they employer has an exacting burden of establishing that age-based discrimination is the only reasonable alternative available.

> (a) Whether occupational qualifications will be deemed to be "bona fide" to a specific job and "reasonably necessary to the normal operation of the particular business," *will be determined on the basis of all the pertinent facts surrounding each particular situation.* It is anticipated that this concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception to the Act, it must be narrowly construed.
>
> (b) An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. *If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.*

29 C.F.R. § 1625.6 (emphasis added).

The EEOC has repeatedly asserted that the Age 60 Rule is not a BFOQ and therefore is in violation of the ADEA. When administration of the ADEA was transferred to the EEOC, in 1979, the EEOC withdrew previous interpretations

issued by the Department of Labor which included the Age 60 Rule as an example of a BFOQ "to avoid the appearance that those examples had received the imprimatur of the Commission," and singled out the Age 60 Rule as the "[m]ost notable in this regard." 46 Fed. Reg. 47,725 (1981). In its opposition to Federal Express's motion to dismiss in the court below, Petitioner submitted a June 12, 1995 letter to the FAA from Elizabeth Thornton, EEOC Deputy Legal Counsel, in the FAA docket proceedings on the Age 60 Rule. The letter set forth the EEOC's official position that it "does not believe that a chronological age limitation is a BFOQ for any pilot because "Pilot skills and health can be assessed accurately on an individual basis, regardless of age." (R-24; R-38.) It cites six previous occasions in which EEOC officials gave testimony or issued statements opposing the Age 60 Rule and urging its change or repeal. (R-37.) [5]

As the agency charged with responsibility for implementing the ADEA, the EEOC's regulations should be given "controlling weight." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *accord, Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969) (deferring to EEOC regulations, citing *Udall v. Tallman*, 380 U.S. 1, 85 (1965). The court below acknowledged that the EEOC has repeatedly urged that the rule violates the statutory prohibition against age discrimination," (App. A at a-

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[5] In addition to its public statements opposing the Age 60 Rule, the EEOC has aggressively pursued litigation against employers who attempted to use the rule as justification for mandatory retirement of pilots and flight engineers who were not subject to the rule. *See, e.g., EEOC v. American Airlines, Inc.*, 48 F.3d 164 (5th Cir. 1995); *EEOC v. Boeing Co.*, 843 F.2d 1213 (9th Cir. 1988), *cert. denied*, 488 U.S. 889 (1988); *EEOC v. Pan American World Airways, Inc.*, 52 Fair Empl. Prac. Cas. 940 (N.D. Cal. 1988).

3) and quoted the EEOC regulations at length (App. A at a-5). Yet it refused to endorse the EEOC's position because: (1) the court concluded, without giving the employee a chance to establish a factual record, that "the rule has been adopted on the grounds that could support a BFOQ defense had the age limit been adopted by the employer voluntarily," (App. A at a-8), and (2) allowing the pilot to contest the rule would require the employer to "second-guess the very agency established by Congress to regulate it" (App. A at a-9). In so holding, the Sixth Circuit ignored the clear language of the ADEA and flaunted the regulations and conclusions of the agency that administers the ADEA to avoid a perceived conflict with an agency that has no authority under that statute.

In departing from the plain language of the ADEA and the regulations that govern that statute, the court below also placed itself squarely in conflict with decisions of this Court that explicitly approve the EEOC regulations and the requirement that the BFOQ exception should be narrowly applied to specific employment situations. In *Criswell* the Court considered whether an employer could use the Age 60 Rule as a justification for mandatory retirement of flight engineers who, though not directly subject to the rule, are part of the cockpit crew and have responsibilities that directly affect the safety of the flight.[6] The Court observed that "the BFOQ exception 'was in fact meant to be an extremely narrow exception to the general prohibition' of age discrimination of the ADEA." 472 U.S. at 412, quoting *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977). It further noted that "Congress expressly decided that problems involving age discrimination in employment should be resolved on a 'case-by-case basis' by proof to a jury." 472 U.S. at 422.

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[6]The flight engineer's duties include management of cabin pressurization, engine and fuel management, and control and management of the electrical and hydraulic systems.

A case decided the same day as *Criswell*, *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353 (1984) confirmed "Congress' indisputable intent to permit deviations from the mandate of the ADEA only in light of a particularized factual showing,"

Early the following year, in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) the Court extended the scope of *Criswell* to apply to the seniority rights of pilots who bid for flight engineer positions because they had reached 60 years of age. It observed that "Every court to consider the issue has assumed that the 'particular business' to which the statute refers is the job from which the protected individual is excluded." At the same time, it declined to address the issue here—whether the Age 60 Rule itself is a BFOQ. In a footnote the Court related that:

> In this litigation the respondents have not challenged TWA's claim that the FAA regulation establishes a BFOQ for the position of captain. The EEOC guidelines, however, do not list the FAA's age-60 rule as an example of a BFOQ because the EEOC wishes to avoid any appearance that it endorses this rule.

Id. at 122, n. 17. The clear implication of this observation is that the status of the Age 60 Rule as a BFOQ for pilots remains to be resolved.

The court below assumed that the "particular business" in question was the broad one of "flying aircraft engaged in Part 121 operations." (App. A at a-5). It therefore perceived no need to examine the specific circumstances of Mr. Coupé's position which, unlike most pilot positions that are subject to the Age 60 Rule, did not implicate the safety of passengers. In

lumping the petitioner together with tens of thousands of other pilots who worked for different airlines in different kinds of operations, the court below ignored the requirement that a BFOQ be established in the context of "the individual employer's need for an age limit." and in light of "the need to consider the actual tasks of the ...employees and the circumstances of employment." *Johnson v. Mayor*, 472 U.S. at 362, n. 8, 371. *Cf. Dothard v. Rawlinson*, 433 U.S. at 335-336 & n.23 (1977) (BFOQ defense in a Title VII sex discrimination case analyzed in light of the specific conditions in Alabama prisons, noting that these conditions were "not typical"); *Torres v. Wisconsin Dep't of Health*, 859 F.2d 1523, 1528 (7th Cir. 1988) (holding that the focus on the "particular business" of the employer often "requires that a court recognize factors that make a particular operation of an employer unique or at least substantially different from other operations in the same general business or profession").

The court below, although it acknowledged *Criswell's* requirement that "The validity of a BFOQ defense turns upon factual findings,"denied petitioner the opportunity to challenge findings made by the FAA which were not briefed or considered in the 12(b)(6) motion before the district court. In accepting these findings as a matter of law, the Sixth Circuit expressly declined to make findings on the necessity for the rule: "We do not hold that the conclusions the FAA has drawn from the scientific evidence are necessarily correct . . . ." (App. A at a-8). But the court nevertheless deprived petitioner of the opportunity to demonstrate that the rule was unnecessary to the cargo operations in which he was exclusively engaged. Thus, although both the EEOC regulations, 29 C.F.R. § 1625.6(b), and this Court's decision in *Criswell*, 472 U.S. at 422, require that the employer sustain the burden of proving a BFOQ, the

court below removed this burden entirely[7].

II.

THE SIXTH CIRCUIT'S DECISION SUSTAINS A LONGSTANDING CONTROVERSY IN THE CIRCUITS CONCERNING THE VALIDITY OF THE AGE 60 RULE AND ITS PROPER APPLICATION.

The administrative struggle that is reflected in the EEOC's seven public statements opposing the Age 60 Rule has been paralleled in judicial proceedings in which the rule has been challenged either by pilots to whom it applies, or pilots and flight engineers who contested employers' attempts to impose the rule in circumstances where the FAA did not require it. The disparate outcomes of these decisions, the variance in the

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[7]The court below found it significant that "Mr. Coupé is not without a remedy for the perceived discrimination," noting that he had not pursued an appeal from the FAA's denial of his petition for an exemption from the Age 60 Rule. (App. A at a-9.) The suggestion that an appeal from a denial of an exemption is somehow equivalent to the remedies under the ADEA is mistaken. As the Seventh Circuit noted in *Baker v. FAA*, 917 F.2d 318, 319, *cert. denied*, 499 U.S. 936 (1991), the pilot's burden of proof in an exemption proceeding is a "heavy burden" requiring "compelling evidence." By contrast, under the ADEA, the burden is on the employer to demonstrate that "no acceptable alternative. . .would better advance [safety] or equally advance it with less discriminatory impact." 29 C.F.R. § 1625.6.

Moreover, the FAA announced, in its December, 1995 disposition, that it will "deny any petition for exemption from the Age 60 Rule without first publishing it for comment unless it contains a proposed technique, not discussed in this Disposition, to assess an individual pilot's abilities and risks of subtle and sudden incapacitation." 60 Fed. Reg. 65,980 (1995). Thus, in the face of a summary denial, the pilot in an exemption proceeding now has little or no opportunity to establish a factual record that could form the basis for a valid appeal.

courts' rationales, and the stridency with which the rule has been criticized, all evidence a manifest the need for guidance from this Court.

Because the Age 60 Rule was promulgated before the ADEA was enacted, the initial challenges to the rule were reviewed without consideration of the ADEA's policy or the EEOC's regulations. The rule was therefore held to be a reasonable exercise of agency discretion without the need to consider age discrimination policy. *See Air Line Pilots Ass'n Int'l v. Quesada*, 276 F.2d 892 (2d Cir. 1960) *cert. denied*, 366 U.S. 962 (1961); *O'Donnell v. Shaffer*, 491 F.2d 59 (D.C. Cir. 1974). Even after the passage of the ADEA the rule was initially assumed to be a BFOQ because the Department of Labor issued interpretations of the ADEA that included the Age 60 Rule as an illustration of a bona fide occupational qualifications. *See Starr v. FAA*, 589 F.2d 307, 313 (7th Cir. 1978). Then, in 1981, the EEOC expressly withdrew the earlier interpretations to make clear that it did not consider the rule to qualify as a BFOQ. 46 Fed. Reg. 47,725 (1981).

Following the passage of the ADEA, a series of appeals in the Seventh Circuit reflected that court's increasing skepticism about the scientific underpinnings of the Age 60 Rule and its viability as a BFOQ. In *Monroe v. United Air Lines, Inc.*, 736 F.2d 394, 405 (1984), a case involving flight engineers, the court noted that "a once-valid BFOQ may lose its justification with advances in medical science. That the age 60 rule may have been a BFOQ in 1978 does not place it beyond challenge now. The Tenth Circuit, in *Gray v. FAA*, 594 F.2d 793, 795 (10th Cir. 1979), expressed the same view. In 1988, in *Aman v. FAA*, the Seventh Circuit reviewed the FAA's denials of petitions for exemptions from the Age 60 Rule submitted by a group of pilots. The court remarked that the FAA's "progress in developing an understanding of the

relationship between aging and flight performance has been disappointing," 856 F.2d at 949, and remanded the case for further proceedings because "the FAA failed to set forth a sufficient factual or legal basis for its rejection of the petitioners' claim that older pilots' edge in experience offsets any undetected physical losses." *Id.* at 957. On review a second time, the court upheld the FAA's refusal to grant exemptions, explaining that "we are not prepared to overrule the agency in a matter of such immense sensitivity as this one," but warned that: "Obviously there is a great body of opinion that the time has come to move on. The agency must give serious attention to this opinion." *Baker v. FAA*, 917 F.2d 319, 322 (7th Cir. 1990), *cert. denied*, 499 U.S. 936 (1991). The dissenting judge explicitly termed the agency's refusal to grant exemptions "a fraud." *Id.* at 327.

Aman and *Baker* did not address the issue of whether the Age 60 Rule could be a BFOQ. The rulings were limited to a review of the soundness of the rule's scientific basis in the context of an exemption proceeding in which the FAA had enormous discretion. By contrast, the Ninth Circuit addressed the BFOQ issue bluntly when a manufacturer attempted to apply the rule to test pilots who were not required to adhere to the rule. In *EEOC v. Boeing Co.*, 843 F.2d 1213, 1217 (9th Cir.), *cert. denied*, 488 U.S. 889 (1988), the Ninth Circuit reversed the lower court's determination that the rule was a BFOQ as a matter of law. The court curtly observed that: "No authority called to our attention justifies deference to an [FAA] determination in the administration of the ADEA." It further cautioned that:

> There is serious doubt that the FAA rule reflects a determination by FAA that age 60 is a BFOQ as defined by ADEA for the commercial pilots to whom it applies, much less a BFOQ for Boeing

> pilots. Although FAA's Age-60 Rule has been sustained as a proper exercise by FAA's rule-making and regulatory power, it has never been tested against ADEA's requirements for BFOQ even for the commercial pilots.

Id. at 1220.

The FAA's decision in December, 1995, to maintain the Age 60 Rule and extend it to commuter airline operations prompted an appeal in the D.C. Circuit in which the rule was challenged both as a violation of the ADEA and as an abuse of discretion under the Administrative Procedure Act. The panel's opinion, issued less than three weeks before the decision here under appeal, unanimously agreed that Age 60 Rule did not violate the ADEA directly because it found that the ADEA was addressed to employers, not to federal agencies, and "should not be read by mere implication to override the specific grants of authority to the FAA in 49 U.S.C. § 44701." *Professional Pilots Fed'n. v. FAA*, 118 F.3d 758, 763 (D.C. Cir. 1997). But the panel was sharply divided as to whether the FAA had a reasonable basis for its decision to maintain and extend the rule. The panel majority concluded that "the FAA was not arbitrary and capricious in violation of the APA." *Id.* at 770. Judge Wald, in a lengthy and stinging dissent, characterized the FAA's refusal to obtain performance data on older pilots as "the epitome of arbitrary action," *Id.* at 771, and admonished that

> The congressional condemnation of age discrimination embodied in the ADEA imposes a duty on the FAA to try to obtain data that might allow it to do away with its current

> reliance on an arbitrary across-the-board age cutoff as a method of ensuring aviation safety.

Id. at 776.[8]

Although the outcome of the *Professional Pilots* case, upholding the validity of the Age 60 Rule, is consistent with the outcome of the Sixth Circuit's decision here, the sharply different reasoning of the two cases has whipsawed petitioner and other similarly situated pilots. The D.C. Circuit, because it believed that the FAA in its regulatory capacity was not required to adhere to the ADEA, determined that "we need not reach the question of whether the Age 60 Rule constitutes a bona fide occupational qualification." 118 F.3d at 763. Therefore the D.C. Circuit made no effort to determine whether the scientific evidence before it was sufficient to establish a BFOQ under the ADEA standards.

The Sixth Circuit, by contrast, declined to invalidate the Age 60 Rule because the FAA was not a party to the litigation and the court was loathe to "strike down the age 60 rule without giving the agency that promulgated it a chance to defend the rule's legitimacy." (App. A at a-4.)The court then proceeded to hold that the rule constituted a BFOQ without reviewing any evidentiary record except the FAA's own self-serving decision. Thus the court that had an evidentiary record before it declined to analyze that record in light of the ADEA requirements for a BFOQ while the court below, without an evidentiary record, purported to determine that the FAA's rulemaking proceeding satisfied the ADEA's requirements.

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[8] A petition for rehearing and suggestion for rehearing en banc in the *Professional Pilots* case was denied on November 5, 1997. Judge Wald submitted a detailed dissent to the court's refusal to hear the case en banc.

It is clear that continued review of the merits of the Age 60 Rule and its proper application by diverse circuit courts of appeals has not settled or clarified the law. Successive opinions have only cast more fuel on a controversy that has burned for nearly forty years producing much smoke and little light The intervention of this Court is needed to resolve the differences among the courts of appeals and put this longstanding controversy to rest.

III.

THIS CASE INVOLVES IMPORTANT QUESTIONS OF FEDERAL AGENCY POWER AND STATUTORY INTERPRETATION.

In the *Criswell* and *Thurston* cases this Court considered whether the Age 60 Rule was a BFOQ for flight engineers not directly subject to the rule. In both cases the Court avoided confronting the legitimacy of the rule itself. Here, the Court not only can resolve the issue left unsettled in *Criswell* and *Thurston*; it can also provide critical guidance concerning the proper sphere of federal agency regulation. The circuit courts that have struggled with the issues since *Criswell* and *Thurston* have failed to produce a convincing explanation for why the dubious policy of an agency that has no power under the ADEA should deprive employees of the rights and process that the ADEA guaranties them. It is again time for the Court to intervene.

In this case, the confused state of the law caused the court below to ignore basic principles of statutory interpretation in its analysis of the FAA's authority under the Federal Aviation Act and the pilot's rights under the ADEA. The court did not even reference the source of the FAA's authority for the Age 60 Rule, which derives from the agency's authority to "prescribe

regulations in the interest of safety for the maximum hours or period of service of airmen." 49 U.S.C. § 44701(a)(4). *See Professional Pilots*, 118 F.3d at 763. The FAA's vague mandate, which makes no reference to any authority to prescribe age limits, stands in sharp contrast to the ADEA's clear prohibition of age-based discharge and the requirement that any BFOQ exception be justified with reference to a "particular business." Yet the court made no attempt to harmonize the two statutes or to apply principles of statutory interpretation to determine how the conflict should be resolved.

Settled principles of statutory interpretation require that, when two statutes are in conflict, they should be harmonized, whenever possible, "to give effect to each if we can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (citations omitted). "We should be reluctant...to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute." *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1988). The court below ignored these principles. Without examining the authority or the scientific basis of the Age 60 Rule it denied petitioner the cardinal remedies afforded by the ADEA—the opportunity for an evaluation of the BFOQ defense as it applied to his particular job and a burden of proof that demanded that the employer exclude other less discriminatory remedies before a BFOQ could be established. Such an extreme departure from accepted statutory interpretation merits prompt and clear correction by this Court.

Because the court below did not attempt to compare the policies underlying the ADEA and the Federal Aviation Act, it recoiled at the prospect of striking down the Age 60 Rule "without giving the agency that promulgated it a chance to defend the rule's legitimacy," (App. A at a-4). It is not clear why this reluctance was necessary. Although there seems to be

no clear precedent involving federal agencies, federal courts have not hesitated to strike down state regulations that violated federal civil rights laws in proceedings against private parties in which the state regulator was absent. *E.g.*, *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (suit against insurance company challenging a provision of the state worker's compensation law on equal protection grounds); *Manning v. UAW*, 466 F.2d 812 (6th Cir. 1972) (suit against employer involving Title VII challenge to Ohio "female protective statutes"); *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971) (suit against employer challenging state law regulating hours of work and weightlifting restrictions for women).

Two other considerations commend this case to this Court's attention. First, the petitioner's predicament is not exceptional but is one that is shared with tens of thousands of other pilots in operations that range from propeller flights carrying ten passengers to transoceanic ones in wide body aircraft.

Second, this case raises the issue of whether a federal agency can use lofty administrative goals such as "safety," "welfare," or the "common good" to circumvent civil rights policy and the authority of the agency that implements that policy. As we have seen, the Seventh Circuit and the Ninth Circuit expressed extreme skepticism about the safety justification for the Age 60 Rule even before the Hilton Report failed to find any correlation between aging and accidents. Judge Wald, in her dissent in *Professional Pilots*, also sharply questioned the rationale of the FAA's "determination that aviation safety requires all common carrier pilots, even those carrying cargo only, to be subject to the age limit but not corporate or air-taxi pilots." 118 F.3d at 770. As Judge Wald points out, European and Asian pilots over the age of 60

regularly fly large passenger aircraft without incident and, due to treaty obligations, they routinely fly into U.S. air space. The FAA has made no effort to collect data on these or other groups of pilots over the age of 60 to see whether the agency's safety fears are justified. 118 F.3d at 775. Yet the court below used a greatly reduced standard of review because it believed the FAA was motivated by "safety concerns."

The underlying issue here is not just a question of whether pilots over the age of 60 are safe to fly. In fact, there is a question of whether the younger and less experienced pilots who remain after the forced retirement of older pilots may pose a greater danger to the public. As the EEOC pointed out in its letter to the FAA, the series of commuter aircraft accidents that prompted the FAA to extend the Age 60 Rule to commuter aircraft operations all involved young and inexperienced pilots, the oldest of whom as 42, and the two youngest 25. Letter from Elizabeth Thornton, EEOC Deputy Legal Counsel to the FAA 2 (June 12, 1995) (R-38).

Judge Wald noted in her dissent that the available accident data on air carrier pilots as they approach the age of 60 fails to demonstrate any increase in accidents, reflecting, instead, "a slight downward trend." 118 F.3d at 773. Yet, while excluding its most experienced pilots from commercial air carrier operations, the FAA routinely grants waivers to younger pilots with serious medical and psychological problems, including alcoholism. *Id.* at 772. Petitioner, whose job did not involve carriage of passengers, was denied a chance to demonstrate that he, and others his age, were as safe or more safe than younger pilots who lacked his experience.

Finally, this case involves broader issues of federal agency power which are not limited to the FAA's activity. No current legal standard exists to determine the appropriate

course of action when two different agencies issue directly conflicting regulations. This case — in which the FAA has used the apparently unassailable excuse of "safety" in order to deny the statutory civil rights protected by another agency's regulations — demonstrates the compelling need for the Court's guidance on this issue.

CONCLUSION

This case presents an important issue of civil rights that has long been subject to conflict and controversy in the courts of appeal. Certiorari should be granted to clarify the statutory policy towards age discrimination, define the limits of federal agency power, and correct a serious and widespread injustice.

Respectfully submitted,

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APPENDIX A:

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT J. COUPÉ,
Plaintiff-Appellant,

v.

FEDERAL EXPRESS CORPORATION,
Defendant-Appellee.

No. 96-5978

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 95-02851--Bernice B. Donald, District Judge.

Argued: June 12, 1997

Decided and Filed: August 4, 1997

Before: KRUPANSKY, NELSON, and BOGGS, Circuit Judges.

COUNSEL

ARGUED: Nicholas H. Cobbs, LAW OFFICES OF NICHOLAS H. COBBS, Washington, D.C., for Appellant. James R. Mulroy, II, FEDERAL EXPRESS CORPORATION, Memphis, Tennessee, for Appellee. **ON BRIEF:** Nicholas H. Cobbs, LAW OFFICES OF

NICHOLAS H. COBBS, Washington, D.C., for Appellant. James R. Mulroy, II, FEDERAL EXPRESS CORPORATION, Memphis, Tennessee, for Appellee.

OPINION

DAVID A. NELSON, Circuit Judge. Except where age is a bona fide occupational qualification reasonably necessary to the normal operation of an employer's business, the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§621 *et seq.*, prohibits the employer from discharging an individual because of his age. See 29 U.S.C. §623(a)(1) and (f)(1). Federal law also prohibits any air cargo operator regulated by the Federal Aviation Administration under Part 121 of the Code of Federal Regulations from using the services of a pilot who has reached his 60th birthday. See 14 C.F.R. §121.383(c).

Where an employer is subject to the FAA rule, does the ADEA prohibit the employer from discharging a pilot because he has turned 60? Concluding that as a matter of law the obligation to comply with the FAA's age 60 rule gives rise to a bona fide occupational qualification reasonably necessary to the normal operation of such an employer's business, the district court answered this question "no." The court gave the correct answer, in our view.

I

The defendant in this case, Federal Express Corporation, operates aircraft used to carry cargo for hire. The company's operations are regulated by the FAA under 14 C.F.R. Part

121.

The plaintiff, Robert J. Coupé, was employed by Federal Express as a professional pilot. Six months before his 60th birthday he told Federal Express that he wanted to continue working in his current job (he was a captain at the time) after he turned 60. Federal Express told him that he could not do so. The company gave him a choice between retiring at 60 or training for a lower-paying position as a flight engineer. (The FAA has not established a mandatory retirement age for flight engineers. See *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 404 (1985).)

Mr. Coupé promptly filed an age discrimination charge with the Equal Employment Opportunity Commission. The EEOC dismissed the charge a few weeks later, noting that Federal Express was acting "pursuant to Federal Air Regulations."

Two months before he turned 60 Mr. Coupé brought the present lawsuit against Federal Express in the United States District Court for the Western District of Tennessee. In addition to setting forth the facts outlined above, the complaint averred, among other things, that the FAA had promulgated the age 60 rule prior to enactment of the ADEA; that the EEOC has repeatedly taken the position that the rule violates the statutory prohibition against age discrimination; that the position from which the plaintiff was to be discharged "is not one for which age is a bona fide occupational qualification;" and that other than age, Federal Express had no reasonable basis for discharging the plaintiff.

Pursuant to Rule 12(b)(6), Fed. R. Civ. P., Federal Express moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court granted

the motion, and Mr. Coupé has perfected a timely appeal.

II

Mr. Coupé asks us to declare the age 60 rule an invalid exercise of agency rulemaking power. The FAA not being a party to this litigation, we are at a loss to understand how we could do so. Federal Express, unlike the FAA, has no strong incentive to defend the rule; as its arguments to us attest, its interest lies in avoiding an injunction that compels it to violate a federal regulation. Mr. Coupé would have us strike down the age 60 rule without giving the agency that promulgated it a chance to defend the rule's legitimacy; this we decline to do.

III

Mr. Coupé also submits that he is entitled to an injunction requiring Federal Express to reinstate him as a pilot with no loss of rank or seniority. Because we agree with the district court that the age 60 rule provides Federal Express a good defense to the ADEA claim as a matter of law, we do not believe that Mr. Coupé has any right to such an injunction.

A

As we have indicated, it is not unlawful for an employer "to take any action otherwise prohibited [by the ADEA] . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . . ." 29 U.S.C. §623(f)(1). The Equal Employment Opportunity Commission has elaborated on this statutory "BFOQ defense" as follows:

> "An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact." 29 C.F.R. §1625.6(b).

In maintaining the age 60 rule subsequent to enactment of the ADEA, the FAA has never expressly purported to establish a bona fide occupational qualification for ADEA purposes. See *Equal Employment Opportunity Comm'n v. Boeing Co.*, 843 F.2d 1213, 1220 (9th Cir.), *cert. denied*, 488 U.S. 889 (1988). That is not the FAA's function; "Congress has not provided for agency determination of whether a particular age is a BFOQ for a particular occupation." *Hahn v. City of Buffalo*, 770 F.2d 12, 15-16 (2d Cir. 1985). Nonetheless, as we shall explain, the FAA performed the same sort of analysis that a court would undertake in determining the legitimacy of a BFOQ defense under the framework established by the EEOC regulation.

As to the first element, the FAA determined — though not in so many words, of course — that its age 60 requirement "is reasonably necessary to the essence of the business . . . ." 29 C.F.R. §1625.6(b)(1). The business in this case is that of flying aircraft engaged in Part 121 operations. The rule was

first promulgated in 1959 "because of concerns that a hazard to safety was presented by utilization of aging pilots in air carrier operations." See 60 Fed. Reg. 65977 (1995). The FAA has reaffirmed the rule several times, most recently in 1995, noting that "[c]learly . . . there is progressive anatomic, physiological, and cognitive decline associated with aging . . . ." *Id.* at 65981.

The FAA has thus decided that safety concerns made the age 60 rule "reasonably necessary" for pilots in Part 121 operations. Safety concerns may be factored into the BFOQ calculus if safety goes "to the core of the employee's job performance" — that is, when the safeguarding of human lives is an inherent part of the job. *United Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 203 (1991). Safety, in our view, goes "to the core" of an aircraft pilot's performance.[1]

As to the second element of the EEOC regulation, the employer has the burden of showing (a) that all or substantially all individuals excluded from the job involved are in fact disqualified, *or* (b) that some of the individuals so

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[1]The Ninth Circuit has questioned whether the FAA's age 60 rule establishes a BFOQ defense even for those employers covered by the rule. *Boeing Co.*, 843 F.2d at 1220. The employer in *Boeing* was not covered by the rule, however, so the court's observations were dicta. We know, moreover, that the "highest degree of safety in the public interest" *is* "reasonably necessary" to Federal Express's aircraft operations — for Congress has said so. See 49 U.S.C. §44701(d)(1)(A) (when promulgating regulations, the FAA Administrator must consider "*the duty of an air carrier* to provide service with the highest possible degree of safety in the public interest") (emphasis added); see also *Murnane v. American Airlines, Inc.*, 667 F.2d 98, 101 (D.C. Cir. 1981) ("we find the maximization of safety to be 'reasonably necessary to the normal operation' of [the defendant airline]"), *cert. denied*, 456 U.S. 915 (1982).

excluded possess a disqualifying trait that cannot be ascertained except by reference to age. The FAA's age 60 rule is premised on the impossibility or impracticality of determining, on an individualized basis, whether a particular pilot's age renders him unable to perform safely and effectively.

In 1959 the FAA justified the rule on the ground that pilot "incapacity . . . cannot be predicted accurately as to any specific individual on the basis of presently available scientific tests and criteria." See 60 Fed. Reg. 65977, 65978 (1995). While acknowledging advances in medical science, the FAA continues to believe that the risk of an aged pilot becoming incapacitated in flight cannot be accurately assessed. "[A]t some age," the FAA stated in 1995, "everyone reaches a level of infirmity or unreliability that is unacceptable in a pilot in air transportation. That age will vary from person to person but cannot yet be predicted in a specific individual." *Id.* at 65981. The FAA rejected the notion that current medical technology can distinguish between those pilots over 59 years old who present safety risks and those who do not. *Id.* at 65985. The FAA thus concluded, in effect, that "some of the individuals so excluded [by the age limit] possess a disqualifying trait that cannot be ascertained except by reference to age." See 29 C.F.R. §1625.6(b)(3).

When a safety justification is offered by an employer, the EEOC regulation also requires that there be "no acceptable alternative [to an age limit] which would better advance [the safety rationale] or equally advance it with less discriminatory impact." 29 C.F.R. §1625.6(b). The FAA has considered alternatives to the age 60 rule, such as performance testing and medical certification, and has rejected each alternative as less safe than the age 60 rule. In the agency's opinion, none

of these options can adequately detect certain risks associated with aging. 60 Fed. Reg. 65977, 65983-84 (1995).

B

The FAA adopted the age 60 rule for reasons that might well support a BFOQ defense if the FAA were the employer. But the fact that the FAA's rationale might support such a defense in that situation does not mean that an age 60 rule would necessarily establish a BFOQ defense if a private employer adopted such an age limit voluntarily. The BFOQ defense requires a particularized, factual showing that the employer's practice is reasonably necessary for the particular job in question. See *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353, 362 (1985); 29 C.F.R. §1625.6(a); *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 844 (6th Cir. 1982). The validity of a BFOQ defense turns upon factual findings. See *Criswell*, 472 U.S. at 422; *Boeing Co.*, 843 F.2d at 1216. Must Federal Express therefore adduce evidence in support of the rule and convince a judicial factfinder that an age limitation for its pilots is a BFOQ on its own merits? We think not.

The employer's burden to make a particularized factual showing in support of its BFOQ defense is satisfied by demonstrating the existence of an age-based federal agency rule by which the employer is bound — at least where, as here, the rule has been adopted on grounds that could support a BFOQ defense had the age limit been adopted by the employer voluntarily. We do not hold that the conclusions the FAA has drawn from the scientific evidence are necessarily correct, although we have no reason to question

their correctness.[2] We hold only that Federal Express need not independently judge the soundness of the age 60 rule. Were it otherwise, Federal Express would be required to second-guess the very agency established by Congress to regulate it. We do not believe that the ADEA mandates such a peculiar result, and we are aware of no judicial decision holding that it does.

IV

Mr. Coupé was not without a remedy for the perceived discrimination. The FAA is authorized to grant exemptions from the safety regulations it has promulgated, see 49 U.S.C. §44701(e), and it has prescribed detailed procedures for handling requests for exemptions. See 14 C.F.R. §11.25. Mr. Coupé knew of the FAA's exemption procedure, as is evidenced by the fact that he requested such an exemption in 1994. See 59 Fed. Reg. 33035 (1994):

> "Docket No. 27751
>
> Petitioner: Robert J. Coupe
>
> Sections of the [federal air regulations] affected: 14 C.F.R. 121.383(c)

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[2]After oral argument in this case, the United States Court of Appeals for the District of Columbia Circuit upheld the FAA's 1995 decision to retain the age 60 rule. *Professional Pilots Federation v. Federal Aviation Admin.*, 118 F.3d 758 (D.C. Cir. 1997). The court concluded that the ADEA, which speaks only to employers, "places no substantive limitation upon the agency's authority to act as a regulator of the airline industry." *Id.* at 763. The court also concluded that the FAA did not act arbitrarily or capriciously in retaining the rule. *Id.* at 766.

> Description of Relief Sought: To permit Mr. Coupe to continue to exercise his airman's privileges as a DC-10 captain after age 60, and until such time as he can no longer pass the required physical, skill, and competency testing and training."

The FAA denied the exemption. See 61 Fed. Reg. 1984 (1996).[3] Mr. Coupé could have obtained judicial review of the denial, see 49 U.S.C. §46110(a), but apparently he chose not to do so. Mr. Coupé not having challenged the FAA's action, neither the district court nor this court is empowered to grant an exemption in the first instance.

AFFIRMED.

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[3]The request for and denial of an exemption are not part of the record before this court, and the parties have not alluded to the exemption proceedings in their briefs. Because the information is contained in the Federal Register, however, we can and do take judicial notice of it.

APPENDIX B:

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ROBERT J. COUPE,

Plaintiffs,

CASE NO. 95-2851-D/V

vs.

FEDERAL EXPRESS CORPORATION,

Defendants.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COMPLAINT

Presently before this court is a motion by defendant, Federal Express Corporation, for dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(6). Plaintiff, pilot Robert J. Coupe, originally filed this action on October 30, 1995, alleging that defendant violated the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., by requiring that he retire from his position on his sixtieth birthday. For the following reasons, the court finds that plaintiff has failed to state a claim upon which relief can be granted.

Federal Express Corporation (hereinafter FedEx), which operates aircraft to carry cargo for remuneration, hired Robert J. Coupe in February 1973, where he worked continuously as a first officer and captain until 1995. On June 25, 1995, Coupe advised FedEx that he wished to continue in that position following his sixtieth birthday on December 29, 1995; FedEx then informed plaintiff that they could not honor his request, since Federal Aviation Administration (hereinafter FAA) Regulations provide that "No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his sixtieth birthday;" further, "No person may serve as a pilot on an airplane" engaged in covered operations, if that person has reached his sixtieth birthday. 14 C.F.R. 121.383(c). The FAA's stated justification for these rules has been that incapacitating medical events and adverse psychological and physical changes, which can occur as a consequence of aging, may endanger the public. Western Airlines v. Criswell, 472 U.S. 400 (1985). Thus, FedEx has utilized a policy in which pilots who serve as captains or first officers are mandatorily retired, or are required to accept positions as flight engineers or second officers exempt from such restrictions.

Notably, plaintiff concedes that defendant was subject to the "Age 60 Rule," and pleads that as an aircraft carrier engaged in operations under Part 121 of the regulations, FedEx was in fact subject to the FAA rules as originally promulgated. Essentially, plaintiff alleges that the subsequently enacted Age Discrimination in Employment Act (hereinafter ADEA) now renders any actions unlawful, in which an employer "discharges any individual or otherwise discriminates . . . with respect to his compensation, terms, conditions, or priveleges [sic] of employment, because of

such individual's age." 29 U.S.C. § 623(a)(1). Therefore, plaintiff argues that in following the "Age 60 Rule," defendant FedEx has violated the ADEA's provisions by discharging or demoting Captain Coupe solely because of his age. In other words, the broad issue before this court is whether defendant, in attempting to adhere to federal regulations via the policies it implemented, may have committed violations of the ADEA for which this court may provide a remedy.

Though the ADEA clearly proscribes discrimination based on an individual's age, its drafters apparently also recognized the need to carve limited exemptions, to accomodate [sic] the laws applicable in foreign countries, and to exempt employers from liability domestically in appropriate situations. Consequently, the ADEA provides,

> (f) It shall **not be unlawful** for an employer . . . **to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business**, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer . . . to violate the laws of the country in which such workplace is located. 29 U.S.C.
> § 623(f) (emphasis added).

Logically, employers' actions do not therefore violate the provisions of the ADEA, where age as a criteria is a 1) bona fide occupational qualification (hereinafter BFOQ), which is 2) reasonably necessary to the normal operation of their particular business. Id.. Thus, the more narrow issue

becomes whether defendant's actions in retiring captains solely because of their age should fall within the BFOQ exemption as a matter of law.

Though no court has specifically addressed this question in the context of an employer who is directly bound by the FAA regulation, other acts which have been taken pursuant to concerns for public safety have qualified as BFOQs in similar situations. For example, in Usery v. Tamiami Trail Tours, Inc., the fifth circuit upheld an employer's refusal to consider applications by those over forty for positions as bus drivers, since stringent job qualifications were related to the essence of the business. 531 F.2d 224 (5th Cir. 1976). Most importantly, the court noted that "the greater the safety factor, measured by the liklihood [sic] of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications" designed to insure safe operation. Id. at 236.

Further, other courts have discussed BFOQs in relation to employers to whom the "Age 60 Rule" does not directly apply. In Rasberg v. Nationwide Life Insurance Company, where an employee challenged a mandatory retirement age of 62 for corporate pilots, the court found that adherence to the FAA rule was conclusive evidence which established an exemption as a matter of law. 671 F.Supp. [sic] 494 (S.D.OH 1987). In other words, where defendant argued that its retirement policy fell within the exemption provision of 29 U.S.C. § 623(f)(1), by relying on the "Age 60 Rule" applicable only to commercial pilots, defendant escaped liability. Most importantly, the Rasberg court noted that a BFOQ existed because of the congruity between corporate and commercial pilots; the extent to which an agency rule is probative in an employer's situation will vary "depending on

the congruity between the occupations at issue and the weight of the evidence supporting its safety rationale." Id.. Thus, it follows that if the "Age 60 Rule" is directly applicable to a position, a BFOQ should exist since congruity is complete.

Similarly, other courts have reiterated that actions taken by employers which would otherwise be unlawful under the ADEA result in no liability, if the employer establishes that age is a BFOQ in light of the particular business. See Touhy [sic] v. Ford Motor Company, 675 F.2d 842 (6th Cir. 1982); Gathercole v. Global Associates, 727 F.2d 1485 (9th Cir. 1984); See also Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976). For instance, even when an employer discharged a sixty year-old pilot in order to comply with the terms of its contract with the Army, which explicitly adopted the age limitation, the reliance on the wisdom of the FAA as expressed in formal regulations was sufficient for an exemption. Id.. Thus, this district court would err in failing to afford an employer the protection conferred by § (f) of the ADEA, where it is clear that the questioned action meets the standard for exculpation. See Gathercole, at 1485, 1488.

Concededly, the sixth circuit [sic] has held that dismissal is inappropriate unless the court applies the proper "reasonable necessity" standard to the adoption of any "Age 60 Rule." Touhy, [sic] at 845. However, "the presence of an overriding safety factor might well lead a court to conclude as a matter of policy that the level of proof required to establish the reasonable necessity of a BFOQ is relatively low," Id., even in a situation where the age rule does not apply to the employer.

Applying these standards, it strains reason to suggest that defendant, who unlike others was in fact directly bound

by the FAA regulations, should have eschewed FAA rules in order to follow the ADEA, particularly since the clearly enunciated exemption could arguably not have been more applicable. In other words, since FedEx was still bound by FAA regulations, it seems logical that their retirement policy was a BFOQ which was "reasonably necessary" to the operation of their particular business. Were the court to hold otherwise, defendant could be sued for having complied with federal aviation regulations which have the force of federal law.

Plaintiff insists that the applicability of a BFOQ exemption, even under these circumstances, is a question of fact to be determined by a jury. In support of this contention, he cites Western Airlines v. Criswell, which expresses a preference for jury resolution. 472 U.S. 400 (1985). Western provided that, to establish a BFOQ defense, an employer must show that age is a legitimate proxy for safety-related job qualifications. Further, the standard is one of "reasonable necessity," and a jury is not required to give complete deference to the employer's decision. Id.. However, Western dealt with flight engineers who had been forced to retire at age 60, and pilots who had been denied reassignment as flight engineers after having reached age 60. In other words, its holding is directly apposite only for positions in which the "Age 60 Rule" was not directly applicable, with the employer having established an age limit on its own initiative. The court specifically acknowledged the distinction, in noting that "the FAA has justified retention of mandatory retirement" for pilots and first officers who have reached age 60 . . . At the same time, the FAA has refused to establish a mandatory retirement age for flight engineers." Western Airlines, at 404.

Plaintiff also cites dicta suggesting that there is "doubt that the FAA rule reflects a determination that age 60 is a BFOQ as defined by the ADEA for commercial pilots to whom it applies." Equal Employment Opportunity Commission v. Boeing Company, 843 F.2d 1213, 1220 (9th Cir. 1988). However, the Boeing court also states that "it may be that the Age-60 Rule reflects an FAA decision to resolve any doubts about the necessity for an age qualification in favor of the passengers . . . Whatever the reason, it cannot be assumed that the concerns that led the FAA to adopt the rule for . . . pilots under Part 121 are equally applicable to determining a BFOQ based on age 60 for Boeing pilots." Id.. Once again, even Boeing, which criticizes the FAA rule, distinguishes itself from the situation where the rule is directly applicable.

Concededly, the "Age 60 Rule" may not be "sacrosanct and untouchable;" . . . "there is a great body of opinion that the time has come to move on." Baker v. Federal Aviation Administration, 917 F.2d 318 (7th Cir. 1990). For example, plaintiff cites numerous scholarly works, suggesting that the rule is outmoded. However, the rule has as of yet survived, and is still a regulation to which FedEx is bound to adhere. Should plaintiff seek to overturn the FAA's rule, the present action is not the proper forum in which to pursue such a cause.

Finally, plaintiff notes that the Equal Employment Opportunity Commission has long disapproved of the "Age 60 Rule." However, in reviewing plaintiff's initial claim with the EEOC for the dispute now at issue, even their office rejected plaintiff's claim because "Respondent's actions were taken pursuant to Federal Air Regulations." (Pla. Exh. 2).

Therefore, if the FAA requires a rule in the interest of public safety, regardless of its continued viability, the rule's implementation is "reasonably necessary" to the perpetuation of a logical business objective. It is difficult for the court to imagine a more apposite application for the defense enunciated within the provisions of the ADEA. Based on the foregoing, the court grants defendant's motion, since dismissal is warranted and proper in this cause.

IT IS SO ORDERED by the court on this 5th day of June, 1996.

s/ Bernice B. Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT COURT JUDGE

APPENDIX C:
STATUTES AND RULES INVOLVED

Age Discrimination in Employment Act, 29 U.S.C. § 623

§ 623. Prohibition of age discrimination

(a) **Employer practices**

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

***

(f) **Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause**

It shall not be unlawful for an employer, employment agency, or labor organization--

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located . . . .

***

The Age 60 Rule, 14 C.F.R. § 121.383(c)

(c) No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

EEOC Regulations, 29 C.F.R. § 1625.6

(a) Whether occupational qualifications will be deemed to be "bona fide" to a specific job and "reasonably necessary to the normal operation of the particular business," will be determined on the basis of all the pertinent facts surrounding each particular situation. It is anticipated that this concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception to the Act it must be narrowly construed.

(b) An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.

(c) Many State and local governments have enacted laws or administrative regulations which limit employment opportunities based on age. Unless these laws meet the standards for the establishment of a valid bona fide occupational qualification under section 4(f)(1) of the Act, they will be considered in conflict with and effectively superseded by the ADEA.

Supreme Court, U.S.
FILED
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No. 97-1012

In The

Supreme Court of the United States

October Term, 1997

ROBERT J. COUPÉ,

Petitioner,

vs.

FEDERAL EXPRESS CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Should Petitioner, who waived his right to challenge the FAA's Age-60 Rule by failing to pursue an exemption petition, be permitted to put the public safety at risk by challenging the Rule in a proceeding in which the FAA is not a party?

CORPORATE DISCLOSURE STATEMENT

Parties:

Robert J. Coupe

Federal Express Corporation

Parent Company:

FDX Corporation

Nonwholly-owned subsidiaries:

Flying Tigers Limited

The Flying Tiger Line (NZ) Limited

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PRELIMINARY STATEMENT

Petitioner challenges the airline industry's "Age-60 Rule," which the FAA, finding no practical individual screening method, has determined continues to be the best means to protect the safety of air transport operations like those of Federal Express. Federal Express is required by federal law to apply the Rule to the Petitioner, subject to the right of each individual to seek FAA exemption. Petitioner waived his statutory right to appeal the FAA's denial of his exemption petition, instead choosing to sue Federal Express and not the FAA. But it is the FAA, not Respondent, that has the interest in defending this Rule as well as the expertise and knowledge behind it. Petitioner's litigation tactic puts the public at risk and should fail.

Respondent requests the Court to deny the petition for writ of certiorari seeking review of an opinion of the Court of Appeals for the Sixth Circuit, reported at 121 F.3d 1022 (6th Cir. 1997) (the "Opinion") that affirmed the unreported opinion of the United States District Court for the Western District of Tennessee, Western Division which rendered its Order Granting Defendant's Motion To Dismiss Complaint, Case No. 95-2851-D/V on June 5, 1996 (the "Dismissal Order"). For the Court's convenience, all citations to the Sixth Circuit's opinion will be to the opinion attached as Appendix A to the Petitioner's Petition for Writ of Certiorari ("Petition").

STATEMENT OF THE CASE

Petitioner asserts that Federal Express Corporation ("Federal Express") violated his rights under the ADEA when it applied the FAA's Age-60 Rule to him, as it was required to do as a carrier operating aircraft used to carry cargo for hire (hereafter, a "Part 121 air carrier"). Petitioner asserts: (1) the Age

Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA") entitles him to an individual factual inquiry into the question whether the Age-60 Rule, 14 C.F.R. § 121.383(c), operates as a bona fide occupational qualification ("BFOQ") 29 U.S.C. § 623(f); and (2) the particular factual inquiry is proper in this case between Petitioner and Federal Express only, despite the absence of the Federal Aviation Administration ("FAA"), which promulgated the Rule under its statutory authority.

The District Court held that since Federal Express was directly bound to adhere to the Age-60 Rule, its implementation of the rule is a BFOQ which is, in the ADEA's words, "reasonably necessary" to the operation of Federal Express' particular business. The District Court stated that the present action does not provide the proper forum for Petitioner's attempt to overturn the FAA's rule.

The Sixth Circuit held that in maintaining the Age-60 Rule, the FAA "performed the same sort of analysis that a court would undertake in determining the legitimacy of a BFOQ defense under the framework established by the EEOC regulation [29 C.F.R. § 1625.6(b)]." This is so because (1) the FAA determined that the rule's promulgation continues to reflect the concern about aging pilots that makes the rule "reasonably necessary" to flying aircraft engaged in Part 121 operations; (2) the rule is premised upon the impossibility or impracticality of individually determining whether a particular pilot's age renders him unable to perform safely and effectively; and (3) the FAA has considered alternatives with less discriminatory impact and rejected all of them as less safe than the Age-60 Rule. The Sixth Circuit stated:

> The employer's burden to make a particularized factual showing in support of its BFOQ defense is

> satisfied by demonstrating the existence of an age-based federal agency rule by which the employer is bound — at least where, as here, the rule has been adopted on grounds that could support a BFOQ defense had the age limit been adopted by the employer voluntarily.

Opinion, a-8.

Finally, the Sixth Circuit noted that Mr. Coupé waived his statutory opportunity to gain judicial review of the FAA's denial of the exemption from the Age-60 Rule he himself had earlier sought. *Id.*, a-9-10.

REASONS FOR DENYING THE WRIT

I.

THE FAA'S DECISION, AFTER CAREFUL REVIEW, TO KEEP THE AGE-60 RULE IN EFFECT SHOULD NOT BE SECOND-GUESSED IN THIS PROCEEDING.

A. This Is Not The Proper Proceeding To Contest The FAA's Determination.

After extensive continuing review, the FAA has decided to maintain the Age-60 Rule for Part 121 pilots like the Petitioner. The Rule is promulgated under the FAA's express, congressionally-mandated authority to prescribe "regulations in the interest of safety for the maximum hours or period of service of airmen." 49 U.S.C. § 44701(a)(4). As the FAA found in its December 1995 decision,[1] the Rule is necessary because

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1. This FAA ruling, or "disposition," is hereafter referred to as the "December 1995 Disposition."

of the "progressive anatomic, physiological, and cognitive decline associated with aging" (60 Fed. Reg. 65,981 (1995)), which necessarily threatens the safety of air commerce, and because, in the current state of medical knowledge, the Age-60 Rule is still the best antidote to potential air carrier disasters. The FAA noted that a general rule is still necessary because there is no adequate method or protocol to enable it to screen out those individual pilots over age 60 who should be required to stop serving in public transport. 60 Fed. Reg. 65,985.

Petitioner here questions the validity of this Rule. But instead of suing the FAA, which decided upon and imposed it, Petitioner chose instead to bring an ADEA action against Federal Express, which did not gather the relevant evidence underlying the Rule and which is required to follow the FAA's mandate or face revocation of its license.[2] By its tactical choice, Petitioner ensured that the only knowledgeable party, the FAA was not, and is not, a party to this action.

Petitioner had an appropriate procedure for challenging the Age-60 Rule with the FAA, the rule's originator, but declined to pursue it. *See* Petition, p. 15, n.7. In 1994 he filed a petition with the FAA for an exemption from the Age-60 Rule. The

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2. 49 U.S.C. § 44701(b)(1) empowers the Administrator of the FAA to prescribe minimum safety standards for air carriers holding certificates under § 44705. Section 44701 is among the provisions 14 C.F.R. § 121.383(c) cites as its authority for requiring Part 121 carriers to adhere to its safety mandate. 49 U.S.C § 46301(a)(2)(B) and (a)(4) provide for a monetary penalty for violations of regulations promulgated under the FAA's mandate to prescribe minimum safety standards for air carriers issued operating certificates (*see* 49 U.S.C. §§ 44701(b)(1) and 44705. 49 U.S.C. § 44709(b)(1)(A) provides for the revocation of any part of a carrier's certificate if the Administrator finds that "safety in air commerce or air transportation and the public interest require the action."

FAA denied this petition on January 24, 1996, and Petitioner declined to appeal the denial to a court. *See* Opinion, a-9-10.[3] Before this time, the FAA had invited exemption-petitioners to submit "a proposed technique, not discussed in the [December, 1995] Disposition, to assess an individual pilot's abilities and risks of subtle and sudden incapacitation." 60 Fed. Reg. 65,980; Petition, p. 15. n.7. There is no indication that Petitioner, whose 60th birthday was December 29, 1995, ever submitted anything that suggested a method to evaluate him or anyone else on an individual basis. Thus, Petitioner failed to submit anything to undermine the FAA's conclusion that the Age-60 Rule enhances the safety of air transport. The FAA's conclusion was affirmed in *Professional Pilots Fed'n. v. FAA*, 118 F.3d 758 (D.C. Cir. 1997).

By pursuing a proceeding in which the FAA is not a party, Petitioner ensured that no party to this proceeding is fully equipped to defend the Rule. As the Sixth Circuit noted, Federal Express "has no strong incentive to defend the rule; as its arguments to us attest, its interest lies in avoiding an injunction that compels it to violate a federal regulation." Opinion, a-4. The lower courts' rejection of Petitioner's tactics needs no review in this Court.[4]

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3. *See* 49 U.S.C. § 46110(a).

4. Petitioner's complaint that the exemption procedure's "compelling evidence" burden is heavier than the employer's burden under the ADEA (Petition, p. 15, n. 7) cannot survive *Professional Pilots*' holding that "the ADEA does not limit the authority of the FAA to prescribe mandatory retirement for pilots." 118 F.3d at 763. For the ADEA's power surely cannot trump the FAA's means for providing relief from the Rule when the Rule itself is beyond the ADEA's reach.

B. The Age-60 Rule Is A Bona Fide Occupational Qualification.

Not only is this proceeding not the proper way to challenge the FAA's rule, but also the Sixth Circuit is plainly correct in its conclusion that, as to pilots under the Age-60 Rule's mandate, the Rule is a BFOQ as a matter of law because "the FAA performed the same sort of analysis that a court would undertake in determining the legitimacy of a BFOQ defense under the framework established by the EEOC regulation." Opinion, a-5. That is, no satisfactory method exists to screen out pilots over 60 on an individual basis. So the Age-60 Rule is, in the current state of knowledge, the best-known alternative to protect the safety of air commerce.

II.

PETITIONER'S LEGAL CHALLENGES TO THE AGE-60 RULE'S APPLICATION TO HIM ARE MISTAKEN.

A. There Is No Conflict Among The Circuits Concerning The Mandatory Application Of The Age-60 Rule.

The fact that courts sometimes observe that medical science may one day render a present a BFOQ invalid hardly creates a conflict *see* Petition, pp. 16-17, and cases dealing with personnel not engaged in Part 121 operations are irrelevant. *See* Petition, p. 17; Opinion, a-5-7. The mandate of the Age-60 Rule, 14 C.F.R. § 121.383(c) is explicitly directed to "the services of any person as a pilot on an airplane engaged in operations under *this part* if that person has reached his 60th birthday." Petitioner was a Part 121 pilot, and the Sixth Circuit's holding was based upon his status as such.

Finally, Petitioner's assertion that he is "whipsawed" by the "sharply different reasoning" of this case and *Professional Pilots Fed'n. v. FAA*, 118 F.3d 758 (D.C. Cir. 1997) (Petition, pp. 18-19) is spurious. The fact is, Petitioner "whipsawed" himself by sacrificing his right to the judicial appeal that could have encompassed all his individual challenges to the Rule. Instead, he brought an overreaching claim against a Part 121 carrier whose disobedience of the Age-60 Rule could have subjected it to sanctions or the revocation of its license. Petitioner himself notes that the outcomes of *Professional Pilots* and the Sixth Circuit's opinion below are consistent. Petition, p. 19. If the *Professional Pilots* decision that "the ADEA does not limit the authority of the FAA to prescribe a mandatory retirement age for pilots" leaves any room for the analysis of individual pilot's complaints like that in the appeal below,[5] the procedure would continue to be the judicial review under 49 U.S.C. § 46110(a) that Petitioner waived in this case.

B. There Is No Statutory Conflict In This Case Requiring The Court's Attention.

Petitioner's assertion of a "confused state of the law" is mistaken. Cases about the harmonization of conflicting statutes[6]

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5. Even Judge Wald prefaced her strong disagreement with the FAA's justification of the Rule's retention by saying: "I agree that the ADEA does not directly govern the FAA in its role as a regulator, and thus the FAA need not prove that the Age 60 Rule is a bona-fide occupational qualification for pilots." 118 F.3d at 770. And the individual pilot's appeal of the denial of his petition for exemption from the Age-60 Rule (Case No. 96-1026) was subsumed into the court's rulings that (1) the ADEA did not limit the FAA's authority regarding pilots' mandatory retirement; and (2) that the 1995 Disposition had sufficient support in the FAA's deliberations.

6. *Watt v. Alaska*, 451 U.S. 259 (1981) and *Patterson v. McLean Credit Union*, 491 U.S. 164 (1988)(Petition, p. 21).

are inapplicable since there is no conflict here. Even if *Professional Pilots* left some questions about the relationship of the ADEA and the FAA's Age-60 Rule's application to Part 121 pilots, this would not be the case that could resolve them, as noted above. Furthermore, in none of Petitioner's cases was the party held accountable to the particular federal statute thereby put in jeopardy of sanctions for violating another federal mandate. (*See* Petition, pp. 21-22.) Finally, Petitioner's criticisms of the Age-60 Rule were considered by *Professional Pilots* and the Sixth Circuit below, both with the aid of briefing by Petitioner's present counsel, Messrs. Cobbs and Pangia.

CONCLUSION

The Sixth Circuit properly ruled against Petitioner's attempt to put Federal Express at risk of violating either the ADEA or the mandatory retirement rule of the agency charged with promulgating and enforcing air safety rules. The writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 6 1998
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No. 97-1012

IN THE
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October Term, 1997

ROBERT J. COUPÉ

Petitioner

v

FEDERAL EXPRESS CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 97-1012

IN THE

Supreme Court of the United States

October Term, 1997

ROBERT J. COUPÉ

Petitioner

v

FEDERAL EXPRESS CORPORATION,

Respondent.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to correct an irreconcilable conflict between an agency regulation and a statute. The FAA's Age 60 Rule, 14 C.F.R. § 121.383(c), requires that all pilots in operations subject to the rule retire when they reach age 60. The Age Discrimination in Employment Act (ADEA), prohibits age-based discharge unless the employer can prove that age is a bona fide occupational qualification (BFOQ). In the Petition for Certiorari we showed that the Age 60 Rule's sweeping and inflexible requirement that all scheduled airline pilots retire at age 60 is incompatible with the requirement that the BFOQ exception should be "narrowly construed," 29 C.F.R. § 1625.6(a), and must be "resolved on a 'case-by-case basis,'" *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422 (1985). We also related how the dubious scientific justification for the Rule has led other courts of appeal

to criticize and limit the rule or to uphold it on grounds that are in conflict with those of the decision below.

Respondent's defense of the Age 60 Rule as a BFOQ (Respt.'s Br. at 6) and its assertion that there is no statutory conflict between the Age 60 Rule and the ADEA (Respt.'s Br. At 7-8) are both perfunctory. Federal Express, does not dispute that the *Criswell* case and the EEOC regulations require an individualized determination as to whether a specific age can constitute a BFOQ for a particular job or that the Age 60 Rule, which applies to pilots in both passenger and cargo operations, is not particular in its application. Instead, the focus of Federal Express's argument here, as in the court below, is that a suit against the employer "is not the proper proceeding to contest the FAA's determination." Respt.'s Br. At 3. We reply to Respondent's contentions here.

I.

THIS PROCEEDING IS THE CORRECT VEHICLE FOR PETITIONER TO ASSERT HIS RIGHTS UNDER THE ADEA.

Federal Express's assertion that the proceeding below is improper has two prongs. First, Respondent urges that it is the wrong party for its employee to sue because "it is the FAA, not Respondent, that has an interest in defending this Rule." Respt.'s Br. at 1. Second, Federal Express argues that the proper procedure for Petitioner to follow would have been to appeal the FAA's denial of his petition for an exemption from the Rule. *Id.* Both of these concerns figured prominently in the Sixth's Circuit's decision below. *See* App. A at a-4, a-9.[1]

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[1]Refers to the appendix of the Petition for Certiorari.

The unusual posture of the parties and the existence of a procedure by which Petitioner could theoretically have sought redress from the FAA do not diminish the validity of his claim nor the importance of review by this Court. On the contrary, the employer's lack of a stake in defending the Rule reflects a conflict in the underlying statutes that has disturbed at least three other circuit courts and now needs to be resolved.

The ADEA unequivocally prohibits age-based discharge by employers except in circumstances where the employer can demonstrate that age is a bona fide occupational qualification. 29 U.S.C. §§ 623(a), 623(f). Neither the statute nor the EEOC regulations contains an exception for age-based discharge that is required by government regulation. On the contrary, the EEOC regulations specifically provide that state laws that set age limits for jobs cannot qualify as a BFOQ automatically but instead must independently "meet the standards for the establishment of a valid bona fide occupational qualification under section 4(f)(1) of the Act." 29 C.F.R. § 1625.6(c). Moreover, the EEOC has taken the official position that the Age 60 Rule is not a BFOQ and therefore violates the ADEA. *See* Pet. for Cert. at 11, n. 5 and accompanying text; *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122, n. 17 (1985).

Thus, the ADEA requires that, even when age discrimination is mandated by government regulation, the employer must prove that it is a BFOQ. But the ADEA does not give the employee a direct remedy against the regulator unless the regulator also happens to be the employer. When regulations requiring age-based discharge have been challenged at the state level, courts have routinely declared the state statutes to be in violation of the ADEA. Often the state itself may be joined in litigation against a local government or other employer that is enforcing a state statute. *See, e.g., Hahn v. City of*

Buffalo, 770 F.2d 12 (2d Cir. 1985); *EEOC v. County of Allegheny*, 705 F.2d 679 (3d Cir. 1983). But courts have also enjoined employers from complying with state mandated retirement policies in circumstances where the state government was not joined as a party. *See EEOC v. School Board of Pinellas Co.*, 742 F. Supp. 622 (M.D. Fla. 1990). *Cf.* cases cited in Pet. for Cert. at 22 (suits against private parties testing other law and regulations). Here, the only means available to Petitioner to obtain protection from discrimination under the ADEA was a suit against his employer.

Both Respondent and the court below assert that Petitioner's proper remedy was to appeal from the FAA's denial of his petition for an exemption from the Age 60 Rule. This procedure would require Petitioner to forfeit one of the key protections the ADEA grants to employees because it would reverse both the burden of proof and the standard of review. Under the ADEA the employer has the burden of proving that an age prohibition constitutes a BFOQ. 29 C.F.R. § 1625.6(b). By contrast, in an appeal from the FAA's denial of a petition for exemption, the petitioner bears a "heavy burden" to present "compelling evidence" that the FAA's decision was unfounded. *Baker v. FAA*, 917 F.2d 318, 319 & 322 (7th Cir.), *cert. denied*, 499 U.S. 936 (1991). Judge Wald noted this discrepancy in her dissent in *Professional Pilots Fed'n v. FAA*, 118 F.3d 758, 771, n.3 (D.C. Cir. 1997), *petition for cert. filed* Feb. 3, 1998 (No. 97-1267), where she compared the burden of proof in an exemption proceeding with that available under the Administrative Procedure Act and observed that, in contrast to exemption proceedings, "the APA requires the FAA to provide a sufficient explanation demonstrating that its actions are reasonable." In turn, the burden under the ADEA, requiring the employer to prove a BFOQ, is considerably more favorable to the employee than the burden a petitioner must sustain in an

appeal under the APA. Nothing in the ADEA or the regulations interpreting it suggests that an employee should have to relinquish his rights under that statute solely because the prohibited discrimination stems from a government agency rather than directly from the employer.[2]

II.

THE CONFLICT BETWEEN THE STATUTES AND IN THE CIRCUIT COURTS REQUIRES RESOLUTION BY THIS COURT.

Federal Express argues that there is "no conflict among the circuits" and "no statutory conflict" to merit the attention of this Court. Respt.'s Br. at 6,7. It submits that Petitioner's "criticisms of the Age 60 Rule" were "considered" by the D.C. Circuit in the *Professional Pilots* case and therefore do not require further review. Respt.'s Br. at 8.

As we noted in the Petition for Certiorari, *see* Pet. For Cert. at 19, the D.C. Circuit's opinion in *Professional Pilots* is premised on a wholly different interpretation of the underlying statutes from the decision here. The D.C. Circuit held that the FAA's powers under the former Federal Aviation Act superseded the ADEA's requirement that age-based prohibitions qualify as a BFOQ. The court below, by contrast, did not examine the FAA's statutory authority because it held that the

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[2]The availability of exemption proceedings as they relate to the Age 60 Rule is illusory. The FAA has never granted an exemption from the Age 60 Rule and announced in its December, 1995 Disposition that it would summarily deny all petitions for exemptions unless they proposed a new technique to assess the pilot's abilities and risk of incapacitation. *See, Aman v. FAA*, 856 F.2d 946, 948 (7th Cir. 1988); Pet. for Cert. at 15, n. 7.

Age 60 Rule qualified as a BFOQ. The *Professional Pilots* case is also before this Court on petition for certiorari, No. 97-1267, filed Feb. 3, 1998. Thus, there is an opportunity for this Court to consider the two cases together and address both the issues of administrative law raised in the *Professional Pilots* case and the civil rights issues raised in the case below.[3]

The compelling reason for a grant of certiorari is not the need to resolve a conflict between the Sixth Circuit's opinion here and the D.C. Circuit's opinion in *Professional Pilots*. It is rather the need to resolve the conflict between an agency regulation that requires age discrimination and a federal statute that prohibits it. This underlying statutory conflict prompted the court below to determine that the Age 60 Rule constituted a BFOQ although this Court's decision in *Criswell* held that such determinations should be based on the facts of each particular case. 472 U.S. at 422. The statutory conflict was noted by this Court in *Thurston* when it observed, without comment, that the EEOC did not consider the Age 60 Rule to qualify as a BFOQ. 469 U.S. at 122, n. 17. The conflict also underlies the criticism of the Age 60 Rule by the Ninth Circuit in *EEOC v. Boeing Co.*, 843 F.2d 1213, 1220 (9th Cir.), *cert. denied*, 488 U.S. 889 (1988). Although the Seventh Circuit, in *Aman* and in *Baker* declined to address the age discrimination issues raised by the ADEA, *see Aman*, 856 F.2d at 956, n. 13, the court's questioning of the rule's necessity in the two cases indicates that

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[3]As Respondent points out, the pendency of this appeal and the *Professional Pilots* appeal at the same time is not fortuitous. The same counsel represent the petitioners in both cases with the intent that both the civil rights and the administrative aspects of the conflict between the Age 60 Rule and the ADEA could only be fully developed in separate suits under the respective governing statutes.

the rule is not required for air safety. *See Aman*, 856 F.2d at 949; *Baker*, 917 F.2d at 322.[4]

This Court recently reaffirmed the principle that an agency "must give effect to the unambiguously expressed intent of Congress." *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, No. 96-843, 1998 U.S. Lexis 1448, at *35 (Feb. 25, 1998), quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The ADEA unambiguously requires that age-based discharge is prohibited unless age is a "bona fide occupational qualification reasonably necessary to the normal operation the particular business." 29 U.S.C. § 623(f)(1). A blanket rule, such as the Age 60 Rule, that takes no account of the unique conditions that particular pilots face in particular operations patently conflicts with the requirements of the statute

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[4]Federal Express asserts that Petitioner's decision to proceed under the ADEA serves to "put the public safety at risk." Resp.'s Br. at i. Since Petitioner, who had an unblemished safety record, served only in cargo operations, it is difficult to see how the public safety would be seriously threatened. This Court held in *Criswell* that public safety considerations do not justify any modification of the requirements for establishing a BFOQ because the need for public safety is a factor to be weighed in determining whether age is a BFOQ for a particular occupation. 472 U.S. at 419.

Significantly, air transport is the only means of transport that is subject to a maximum age limit for operators. There are no regulatory age limits for ship's officers, railroad engineers, or truck or bus drivers, although, unlike airplanes, these other modes of transport normally have only a single person operating the controls.

CONCLUSION

The court below erred in failing to allow Petitioner the opportunity to assert his rights under the ADEA. The underlying conflict here threatens to corrode fundamental principles concerning the importance of civil rights and the extent of administrative agency discretion. As set forth in the Petition for Certiorari, this Court should grant certiorari to resolve conflicts in the courts and to define the limits of agency power.

Respectfully submitted,

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